No. 75-290

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

ERNESTO LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the "harboring" of illegal aliens can be accomplished only by "concealment" in connection with smuggling aliens into the country, and that any broader interpretation of "harboring" would not give fair warning of the conduct proscribed.

After eight days of trial in the United States District Court for the Eastern District of New York, petitioner pleaded guilty to one count of conspiring

to harbor illegal aliens, in violation of 8 U.S.C. 1324 (a)(3). He was sentenced to a term of four years' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. 1a-10a).[1]

The facts are summarized in the opinion of the court of appeals (Pet. App. 3a-4a). Petitioner owned several houses in Nassau County, New York. He operated these houses as havens for aliens who he knew had illegally entered the United States. Each illegal alien paid petitioner $15 weekly for the privilege of shelter. Several of the aliens had been given the address of petitioner's houses prior to their illegal entry into the United States. Petitioner assisted the aliens in other ways. For example, petitioner completed job applications for some aliens and transported them to and from work. For large fees, petitioner also arranged sham marriages. In July 1974, Immigration and Naturalization Service investigators searched six of petitioner's houses, apprehending 27 illegal aliens.

1. To "harbor" has several possible meanings. Petitioner cites cases construing that term in a way that requires concealment, arguing that it must have the same meaning in Section 1324(a)(3). Petitioner's narrow definition of "harbor" would read it out of the statute, for it appears in the phrase "to conceal, harbor, or shield from detection * * *." Petitioner offers no persuasive argument in support of

[1] With the permission of the district court and the United States, petitioner was permitted to appeal the legal issues involved.

his assertion that "harbor" is redundant with "conceal" and "shield from detection." The term more logically has the meaning given it by the court of appeals: to harbor is to give refuge or shelter. Petitioner has done just that. There is no conflict among the circuits concerning the interpretation of Section 1324(a)(3) as amended in 1952; indeed, petitioner asserts (Pet. 25, n. *) that his case is unique. Accordingly, there is no reason to grant the petition.

2. In 1952 Congress amended the predecessor statute, 8 U.S.C. (1946 ed.) 144, in response to *United States* v. *Evans*, 333 U.S. 483, which had held that the penalty section of the statute reached only the crime of smuggling aliens and did not reach the crimes of harboring or concealment. The stated purpose of the amendment was to enlarge the statute's coverage to prevent illegal aliens "from entering *or remaining* in the United States illegally * * *." H.R. Rep. No. 1377, 82d Cong., 2d Sess. 1 (1952). The "harboring" prohibition is an integral part of the congressional design to prevent illegal aliens from "remaining" in the United States.

The language of the statute itself supports a distinction between the crimes of "concealing" and "harboring" illegal aliens. The phrase "conceal, harbor or shield from detection" is in the disjunctive. Congress emphasized the distinction between "harboring" and "concealing" by enacting a proviso exempting employers from the operation of the "harboring" provision but not from the "concealing" provision. Congress evidently understood "harbor" to be a term of

such sweep that, without the proviso, and without concealment, mere employment would constitute harboring. This proviso is strong evidence both that "harbor" is used in the statute in its everyday sense and that it is not synonymous with "conceal." Moreover, the 1952 amendments added a requirement of "willfullness and knowledge" to the harboring and concealment section. As the Senate debates show, this requirement was added to prevent a person from being guilty of harboring merely because he provided shelter to an illegal alien without knowing his illegal status. 98 Cong. Rec. 5319-5321 (1952). No mention of any act of concealment was made in connection with the discussion of "harboring."

3. Petitioner also contends that "harboring" is forbidden only if it is a part of the smuggling process. But the legislative history clearly shows that a purpose of the act was to prevent illegal aliens from remaining in this country. H.R. Rep. No. 1377, *supra*. The statute was amended specifically to create separate penalties for smuggling and harboring. An argument that the statute addresses only smuggling is consequently untenable.

Furthermore, petitioner's argument is inconsistent with at least two provisions in the statute. Section 1324(a)(2) prohibits the knowing transportation of illegal aliens; it requires proof that the defendant reasonably believed that the alien's entry into the United States occurred less than three years before. As the court of appeals recognized, "[t]ransportation at a point in time so long after the illegal entry

would not normally be in furtherance of the smuggling process, which would long since have been completed" (Pet. App. 7a-8a). Section 1324 also exempts employers from the crime of harboring. Since employment is not part of the chain of smuggling, this exemption would be superfluous under petitioner's construction of the statute. As the court of appeals assessed the case against petitioner (Pet. App. 8a-9a):

> [Petitioner's] conduct as evidenced at trial clearly falls within [the proper] construction of § 1324(a)(3). The substantial number of illegal aliens sheltered by him, the entry of some from El Salvador with the addresses of his houses in hand, their travel directly to these houses after their illegal entry, his assistance to them in obtaining employment for them and transporting them to and from their jobs, his arrangement of sham marriage ceremonies to United States citizens for the purpose of enabling the aliens to claim citizenship, and his assistance in preparation of their applications for citizenship are circumstances which, taken together, warrant the inference that [petitioner] was engaged in providing shelter and other services in order to facilitate the continued unlawful presence of the aliens in the United States, which amounts to harboring within the meaning of the statute. Indeed such a large-scale operation would appear to establish a sufficient link with the aliens' illegal entry even to satisfy the stricter interpretation of § 1324 advanced by [petitioner]. * * * We are satisfied that [petitioner's] conduct is clearly encompassed within the meaning of

> § 1324 and that the construction urged by him would have the effect of failing to implement its language and purpose.

4. Petitioner argues that the court of appeals' interpretation of Section 1324(a)(3) is so novel that petitioner was not given fair notice that his conduct was criminal. But the court of appeals simply took "harbor" at its usual meaning. This is hardly a novel or unpredictable construction. Moreover, in *United States* v. *Evans*, *supra*, 333 U.S. at 485, n. 1, this Court stated that concealment and harboring might be considered separate crimes under the predecessor statute. That harboring and concealment were intended to be separate crimes under the present statute is clear from its language and legislative history. Finally, as the court of appeals wrote (Pet. App. 10a):

> * * * [Petitioner's] conduct could reasonably have been found from all the circumstances to have been designed to facilitate the alien's illegal entry. [Petitioner], therefore, had fair warning that his conduct might be held to violate § 1324, even if that statute were construed along the lines now advocated by him.

5. Petitioner finally contends that the exception given to employers constitutes invidious discrimination. This statutory exception, however, is a classification supported by a rational basis. "[A]n employer of numerous persons may well have a lesser capacity to ascertain their alienage status than does a landlord to determine that of his tenants" (Pet.

App. 10a). The exception creates no invidious discrimination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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